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No. 00-1621

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

GWI PCS 1, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION OF CINGULAR WIRELESS LLC, SALMON PCS LLC, AND VERIZON WIRELESS FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER

Cingular Wireless LLC, Salmon PCS LLC, and Verizon Wireless hereby move, pursuant to Rules 21 and 37 of the Rules of this Court, for leave to file the attached Brief of *Amici Curiae* in Support of Petitioner. Counsel for petitioner has consented to the filing of this brief, but counsel for respondent has not done so.*

In this case, the court of appeals employed the bankruptcy law doctrine of equitable mootness to insulate from review a bankruptcy court decision that usurped the Federal Communications Commission's ("FCC") exclusive authority to allocate licenses in the public interest. Similar issues are raised in a case currently before

* The letter reflecting petitioner's consent has been filed with the Clerk.

the D.C. Circuit, *NextWave Personal Communications Inc. v. FCC*, Nos. 00-1402 & 00-1403 (D.C. Cir. argued Mar. 15, 2001), in which *amici* Verizon Wireless and certain of Cingular Wireless's predecessors in interest (BellSouth Corporation and BellSouth Cellular Corp.) are intervenors. Cingular also holds a non-controlling interest in *amicus* Salmon PCS.

NextWave, like respondent GWI PCS, Inc., failed to comply with the express condition on its licenses that it make full and timely payment of its winning bids after declaring bankruptcy. NextWave has argued to the D.C. Circuit that specific Bankruptcy Code provisions prevented its licenses from automatically canceling notwithstanding that failure. Both the Fifth Circuit's use of the equitable mootness doctrine and NextWave's argument based on provisions of the Bankruptcy Code are specific examples of the same general error: namely, use of bankruptcy law to override an agency's regulatory authority, granted by Congress, to pursue *non-creditor* governmental interests.

Although the FCC has been unable to reclaim GWI's licenses, it has reclaimed and reauctioned NextWave's licenses, as a result of two Second Circuit decisions rejecting NextWave's claim that the bankruptcy court had authority to interfere with the automatic cancellation of those licenses. During the reauction, Verizon Wireless and Salmon PCS won 192 licenses, many of them formerly held by NextWave, with winning bids totaling almost $11.7 billion. The ability of *amici* to retain those licenses, however, may depend on the outcome of the litigation currently pending before the D.C. Circuit. *See* Public Notice, *Auction of Licenses for C and F Block Broadband PCS Spectrum*, 15 FCC Rcd 22466, 22468 (2000). Moreover, acceptance of the Fifth Circuit's reasoning, or NextWave's argument, would frustrate the FCC's license allocation decisions and encourage the type of speculative and insincere bidding that the FCC's auction rules, which require full and timely payment of

winning bids, were designed to prevent. *Amici* thus have a vital interest in the outcome of this case.

For the reasons stated above, movants ask that their motion be granted.

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, *amici* Cingular Wireless LLC ("Cingular"), Salmon PCS LLC ("Salmon"), and Verizon Wireless ("Verizon") state the following:

Cingular Wireless LLC. Cingular was created in October 2000 by the contribution of the domestic wireless voice and data communications assets of wholly owned subsidiaries of SBC Communications Inc. ("SBC") and BellSouth Corporation ("BellSouth"), both of which are publicly traded companies. SBC and BellSouth have no parent companies, and no publicly held company has a 10% or greater ownership interest in either SBC or BellSouth.

Salmon PCS LLC. Salmon is a Delaware limited liability company. Both Cingular and Crowley Digital Technologies, LLC hold a 10% or greater ownership interest in Salmon. Salmon has no parent company, and no publicly held company has a 10% or greater ownership interest in Salmon.

Verizon Wireless. Verizon is a general partnership (Cellco Partnership d/b/a Verizon Wireless) that is ultimately owned by Verizon Communications Inc. and Vodafone Group PLC, both publicly held companies. Neither Verizon Communications nor Vodafone has a parent company, and no publicly held company has a 10% or greater ownership interest in either.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENTS i

TABLE OF AUTHORITIES v

INTEREST OF *AMICI CURIAE* 1

STATEMENT 1

SUMMARY OF ARGUMENT 8

ARGUMENT 10

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Board of Governors v. MCorp Fin., Inc., 502 U.S. 32 (1991) 9, 13, 14, 15

Cerny, In re, 17 B.R. 221 (Bankr. N.D. Ohio 1982) 17

Club Assocs., In re, 956 F.2d 1065 (11th Cir. 1992) 17

Continental Airlines, In re, 91 F.3d 553 (3d Cir. 1996) 18

Duffey v. Dollison, 734 F.2d 265 (6th Cir. 1984) 17

Envirodyne Indus., Inc., In re, 29 F.3d 301 (7th Cir. 1994) 18

FCC, In re, 217 F.3d 125 (2d Cir.), *cert. denied*, 121 S. Ct. 606 (2000) 9, 14, 15, 17

FCC v. WOKO, Inc., 329 U.S. 223 (1946) 10

Information Dialogues, Inc., In re, 662 F.2d 475 (8th Cir. 1981) 17

Kelly v. Robinson, 479 U.S. 36 (1986) 9, 14, 15

Manges, In re, 29 F.3d 1034 (5th Cir. 1994) 17

Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494 (1986) 9, 14

NBC v. United States, 319 U.S. 190 (1943).....1

NextWave Personal Communications, Inc., In re, 200 F.3d 43 (2d Cir. 1999), *cert. denied*, 121 S. Ct. 298 (2000) .....*passim*

Ohio v. Kovacs, 469 U.S. 274 (1985) 9, 14

PLMRS Narrowband Corp. v. FCC, 182 F.3d 995 (D.C. Cir. 1999) 13

PWS Holding Corp., In re, 228 F.3d 224 (3d Cir. 2000) 18

Perez v. Campbell, 402 U.S. 637 (1971) 9, 15

Raleigh v. Illinois Dep't of Revenue, 530 U.S. 15 (2000) 13, 17

U.S. Airwaves, Inc. v. FCC, 232 F.3d 227 (D.C. Cir. 2000) 5

United States v. Consumer Health Servs. of America, Inc., 108 F.3d 390 (D.C. Cir. 1997) 13

United States v. Southwestern Cable Co., 392 U.S. 157 (1968) 10

United States Dep't of Housing & Urban Dev. v. Cost Control Marketing & Sales Mgmt. of Virginia, Inc., 64 F.3d 920 (4th Cir. 1995) 15

ADMINISTRATIVE DECISIONS

Memorandum Opinion and Order, *Licenses of 21st Century Telesis, Inc.*, FCC 00-434, 2000 WL 1862889 (rel. Dec. 21, 2000) 17

Order on Reconsideration of the Second Report and Order, *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, 13 FCC Rcd 8345 (1998) 11

Second Report and Order, *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, 9 FCC Rcd 2348 (1994) .....*passim*

Second Report and Order and Further Notice of Proposed Rulemaking, *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, 12 FCC Rcd 16436 (1997) 4, 11, 13

LEGISLATIVE MATERIALS

H.R. Rep. No. 103-111 (1993) 2, 3, 11, 13

CONSTITUTION, STATUTES, AND REGULATIONS

U.S. Const. Art. III 7

Bankruptcy Code (11 U.S.C.):

11 U.S.C. § 362(a) 14

11 U.S.C. § 362(b)(4) 14

11 U.S.C. § 548 5

11 U.S.C. § 554(a) 14

Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*:

47 U.S.C. § 307(a) 1, 10

47 U.S.C. § 309 5

47 U.S.C. § 309(j) 2, 12, 17

47 U.S.C. § 309(j)(3)(C) 2

47 U.S.C. § 309(j)(4)(D) 3

47 U.S.C. § 309(j)(6)(A) 10

47 U.S.C. § 309(j)(6)(C) 10, 16

47 U.S.C. § 309(j)(6)(D) 10, 16

47 U.S.C. § 309(j)(7)(A) 3, 13

47 U.S.C. § 309(j)(7)(B) 3, 13

47 C.F.R.:

§ 1.2110(e)(4) (1996) 4

§ 24.203(a) 16

OTHER MATERIALS

FCC, Wireless Telecommunications Bureau, *The FCC Report to Congress on Spectrum Auctions*, WT Docket No. 97-150, FCC 97-353 (rel. Oct. 9, 1997) 2

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

The interest of *amici* appears from the foregoing motion.[1]

STATEMENT

1. Congress has conferred exclusive authority upon the FCC to allocating radio spectrum in accordance with "the public convenience, interest, or necessity." 47 U.S.C. § 307(a); *NBC v. United States*, 319 U.S. 190, 213-19 (1943). In issuing licenses for wireless telecommunications, the FCC has used, in succession, three different allocation methods—comparative hearings, lotteries, and auctions—each designed to award licenses to further the public interest. *See* Pet. 2-3.

[1] No person or entity, other than *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

In 1993, having concluded that existing methods of allocating licenses had "not served the public interest," H.R. Rep. No. 103-111, at 248 (1993) ("H.R. Rep."), Congress authorized the FCC to use "competitive bidding," or auctions, to allocate licenses. 47 U.S.C. § 309(j). *See* Pet. 3-4. As the FCC recognized in promulgating rules to implement its new authority, "the market value assigned to licenses via the auction process can be expected to reflect the benefits to both consumers and producers, now and in the future." Second Report and Order, *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, 9 FCC Rcd 2348, 2360-61, ¶ 70 (1994) ("*Second Report and Order*").[2]

The value placed on a license in an auction, however, will not accurately reflect those public benefits if bids are distorted through strategic behavior. The Commission therefore established rules requiring the full and timely payment of the amount bid and imposing penalties for default, which together preserve "the integrity of the auction" by discouraging "[i]nsincere" and "[s]peculative" bidding. *E.g.*, *id.* at 2373, ¶ 147, 2381-82, ¶ 192.

The purpose of the full-and-timely-payment rules—like that of comparative hearings and allocation of licenses by lottery—was to ensure that the auction winner was the licensee most likely to put the spectrum to the use most beneficial to the public interest. Although auctions, unlike hearings and lotteries, also "recover[] for the public . . . a portion of the value of the public spectrum resource," 47 U.S.C. § 309(j)(3)(C), Congress made clear that the FCC was to design auctions and allocate licenses "based on sound commu-

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[2] The Commission has explained that "awarding spectrum using competitive bidding aligns the licensees' interests with the public interest in efficient utilization of the spectrum." FCC, Wireless Telecommunications Bureau, *The FCC Report to Congress on Spectrum Auctions* at 14, WT Docket No. 97-150, FCC 97-353 (rel. Oct. 9, 1997).

nications policy pursuant to the Communications Act," H.R. Rep. at 258. To that end, Congress dramatically curtailed the extent to which the FCC could consider "the expectation of Federal revenues" when auctioning spectrum. 47 U.S.C. § 309(j)(7)(A)-(B); *see also* H.R. Rep. at 258. Thus, the full-and-timely-payment rules directly serve, not the government's pecuniary interests, but the FCC's responsibility to allocate licenses in accordance with the public convenience, interest, and necessity.

2. Congress also instructed the FCC to ensure that its auction procedures offered small businesses "the opportunity to participate in the provision of spectrum-based services." 47 U.S.C. § 309(j)(4)(D). The Commission determined that, for certain auctions, it would permit a small business to pay the full amount bid in installments rather than in a lump sum. *See Second Report and Order*, 9 FCC Rcd at 2389-91, ¶¶ 231-239. To ensure that bids from small businesses eligible for installment payments accurately reflected the benefits to the public, the Commission specified that such licenses would be "conditioned upon the full and timely performance of [the] payment obligations under the installment plan," with licenses automatically to cancel on failure to pay. *Id.* at 2391, ¶ 240; *see also id.* at 2390, ¶ 237. Thus, the Commission continued to require full and timely payment of the winning bid in order to preserve the integrity of its auctions and to further the public interest.

Among the licenses offered to small businesses under these auction and installment payment rules were the "C-Block" of broadband PCS licenses, which were auctioned in 1996. *See* Pet. 5-7. Respondent GWI was among the winners of that auction. The licenses that GWI received were expressly conditioned on "the full and timely payment of all monies due pursuant to . . . [the] terms of the Commission's installment plan." Pet.

App. 175a. Failure to make these payments would "result in the automatic cancellation" of the licenses. *Id.*

That condition was repeated in the Installment Payment Plan Note that GWI signed, which also stated that the "enforcement authority of the Commission shall remain applicable in the event of a failure to comply with the terms and conditions of the License, *regardless of the enforceability of this Note or the Security Agreement.*" B.R. Tab 28, Gov't Exh. 260, at 3 (emphasis added). That Security Agreement, like the Note, protected the Commission's *creditor* interests in relation to GWI,[3] but notably provided that its rights as a creditor are "not in derogation of any of the Commission's *regulatory* authority over the License." B.R. Tab 28, Gov't Exh. 261, at 2 (emphasis added). Finally, the FCC's rules, incorporated in both documents, reiterated that failure to make full and timely payment would violate a condition of the licenses and result in their "automatic" cancellation. *See* 47 C.F.R. § 1.2110(e)(4) (1996).

3. A number of the C-Block licensees thereafter petitioned the FCC for relief, claiming they were unable to obtain the financing required to make their installment payments. In response, the Commission temporarily suspended those payment obligations and ultimately offered C-Block licensees a menu of new financing options. *See* Pet. 7-8. Significantly, the Commission consistently rejected requests that it permit licensees to retain their licenses without paying the winning bids in full. That course of action, the agency explained, would "gravely undermine the credibility and integrity" of the auction rules. Second Report and Order and Further Notice of Proposed Rulemaking, *Amendment of the*

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[3] For example, to the extent the Commission seeks to recover any of the default penalties that it established to ensure the integrity of its auction, *see, e.g.*, *Second Report and Order*, 9 FCC Rcd at 2382-83, ¶ 197, the Note and Security Agreement provide for suits for collection and priority *vis-à-vis* other creditors, which are matters not directly addressed in the FCC's regulations.

Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, 12 FCC Rcd 16436, 16447, ¶ 19 (1997) ("*Restructuring Order*").

The D.C. Circuit affirmed the Commission's decision, finding that the minor alterations in the repayment scheme were not arbitrary. *See U.S. Airwaves, Inc. v. FCC*, 232 F.3d 227, 235-36 (D.C. Cir. 2000). That court strongly suggested, however, that, if the Commission had "simply forgive[n] agreed-upon payments," it would have violated its "duty to losing bidders." *Id.* at 235.

Despite the relief that the FCC offered C-Block licensees, a number of them—including GWI—filed for bankruptcy in lieu of selecting one of the refinancing options. GWI also began an adversary proceeding against the FCC, seeking to retain its licenses while avoiding its obligation to make full and timely payment, on the ground that the obligation constituted a constructively fraudulent conveyance under 11 U.S.C. § 548. The Commission argued in response that allowing GWI to keep its licenses while paying less than the full amount of the winning bid would undermine the system of assigning licenses by auction.

The bankruptcy court held, however, that the full-and-timely-payment requirement furthered only the FCC's interests as a creditor. *See* Pet. App. 150a ("This is not a regulatory issue, but a creditor issue."); *id.* at 159a. The court further concluded that allowing GWI to pay only $166 million for its licenses—rather than the $1.06 billion it bid—promoted the goals of section 309 of the Communications Act, notwithstanding the fact that the FCC had concluded otherwise. *See id.* at 161a. Finally, the court enjoined the FCC from revoking the licenses based on GWI's failure to comply with the full-and-timely-payment condition. *See id.* at 162a.

Shortly thereafter, the bankruptcy court confirmed GWI's plan of reorganization. *See* Pet. 10. In its order, the court concluded that "the plan fulfills the express

public policy legislated by the Congress in Section 309 of the Communications Act, even if the route taken to fulfill that policy is different than the FCC desires." Pet. App. 69a; *accord id.* at 95a-96a. Finally, the court concluded that the remedies included in the plan (*see id.* at 84a-87a) ensured that, "[a]s a creditor, the government can only have a positive recovery." *Id.* at 93a.

The Fifth Circuit thereafter denied the government's petition for a stay pending its appeal to the district court. *See id.* at 167a-168a. More than a year later, during which time the reorganization proceeded apace, the district court dismissed the majority of the government's appeal on the ground that the case had become "equitably moot." *See id.* at 48a-59a. The court also affirmed the bankruptcy court's avoidance order, without discussing any of the government's arguments, including the question whether the bankruptcy court had usurped the FCC's regulatory prerogatives. *See id.* at 57a.

4. The court of appeals affirmed. It, too, did not address the question whether the bankruptcy court was wrong to conclude that the FCC's full-and-timely-payment requirement furthered only its creditor interests, although it acknowledged that the bankruptcy court had "tak[en] onto itself a quasi-regulatory function held by the FCC." *Id.* at 31a-32a. The court noted that the Second Circuit, in an analogous case, had reached the opposite conclusion and reversed the bankruptcy court. *See In re NextWave Personal Communications, Inc.*, 200 F.3d 43, 54-55 (2d Cir. 1999) (holding that, by permitting a C-Block licensee to retain its licenses while avoiding the obligation to make full payment, the bankruptcy court had "impaired the FCC's method for selecting licensees" and had improperly "exercised the FCC's radio-licensing function"), *cert. denied*, 121 S. Ct. 298 (2000). The full-and-timely-payment condition, the Second Circuit found, had "primarily a regulatory purpose: to ensure that spectrum licenses end up in the

hands of those most likely to further congressionally defined objectives." *Id.* at 54. The failure to make installment payments, therefore, "had more than financial implications"—it "indicated that under the predictive mechanism created by Congress to guide the FCC, NextWave was not the applicant most likely to use the Licenses efficiently for the benefit of the public" and "meant, in regulatory terms, that NextWave was not entitled to the Licenses." *Id.*

Nonetheless, the court below held that the Second Circuit's determinations—that the bankruptcy court was "fundamentally mistaken" in concluding that the full-and-timely-payment obligation raised only questions of debtor-creditor relations and had interfered with the FCC's "sole responsibility for the allocation of licenses," *id.* at 54-55—had no relevance to its application of the doctrine of equitable mootness. Pet. App. 32a. Indeed, the court of appeals never considered whether application of equitable mootness, a pragmatic doctrine unrelated to Article III mootness, *id.* at 22a, was appropriate when it would operate to insulate from review a bankruptcy court decision interfering with a government agency's regulatory authority. *See id.* at 29a-33a. The result of the court of appeals' decision was that "the only remedy available to the FCC is an unsecured claim (payable only out of the $18 million Unsecured Creditors' Fund)." *Id.* at 34a. The court then denied the Commission even that remedy. *See id.* at 34a-47a.

SUMMARY OF ARGUMENT

The court of appeals' application of equitable mootness to preclude review of the bankruptcy court's decision in this case is just one example of a more general error: namely, using the Bankruptcy Code to override an agency's regulatory authority, conferred by Congress, to pursue *non-creditor* governmental interests. Indeed, this fundamental error pervades the decisions of the court of appeals, the district court, and the bankruptcy court in this case. Each court treated the FCC as though it were a mere creditor, seeking to advance only pecuniary interests by enforcing the full-and-timely-payment condition. Thus, each treated this case as if it required a straightforward adjudication of debtor-creditor relations, either under the Bankruptcy Code or under the equitable mootness doctrine that the courts of appeals have appended to that Code.

But the full-and-timely-payment condition, like other conditions the FCC has established for the receipt and retention of licenses, serves "primarily a regulatory purpose": namely, allocation of spectrum licenses in the public interest. *In re NextWave*, 200 F.3d at 54. When the FCC enforces this condition through automatic cancellation of spectrum licenses, it is not furthering creditor interests, whether of the government or a third party. Instead, enforcement of the full-and-timely-payment condition is essential to ensure that "the market value assigned to licenses via the auction process" will properly "reflect the benefits to both consumers and producers" and thereby serve as a basis for allocating licenses in accordance with the public convenience, interest, and necessity. *Second Report and Order*, 9 FCC Rcd at 2360-61, ¶ 70. Therefore, when GWI attempted to retain its licenses at a price far below its winning bid, it eliminated the basis on which the FCC had presumed that GWI was the license applicant "who will provide service and use spectrum most efficiently." *Id.* at 2349, ¶ 4. In the language of the Second Circuit, in an analo-

gous case, GWI's "inability to follow through on its financial undertakings had more than financial implications"; it "meant, in regulatory terms, that [GWI] was not entitled to the Licenses." *In re NextWave*, 200 F.3d at 54.

This Court has recognized repeatedly that the Bankruptcy Code does not interfere with governmental actions that further *non-creditor* interests. *See, e.g., Board of Governors v. MCorp Fin., Inc.*, 502 U.S. 32, 40 (1991); *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 507 (1986); *Ohio v. Kovacs*, 469 U.S. 274, 283 n.11 (1985); *Perez v. Campbell*, 402 U.S. 637, 653-54 (1971); *cf. Kelly v. Robinson*, 479 U.S. 36, 53 (1986). The Second Circuit applied that principle when it determined that a bankruptcy court has no authority to contradict the FCC's licensing decisions simply because it believes that "granting the Licenses at a small fraction of [the] original successful bid price best effectuate[s] the [Communications Act's] goals." *In re NextWave*, 200 F.3d at 55. And, when the bankruptcy court thereafter ruled that various Bankruptcy Code provisions barred the FCC from revoking NextWave's licenses because of its failure to comply with the full-and-timely-payment condition, the Second Circuit invoked that principle again, rebuking the bankruptcy court for ignoring its "instruct[ion] . . . to refrain from interfering with the licensing decisions of the FCC." *In re FCC*, 217 F.3d 125, 134-39 (2d Cir.), *cert. denied*, 121 S. Ct. 606 (2000).

By contrast, the court below ignored this principle and permitted bankruptcy law to trump the FCC's exercise of the licensing authority conferred on it by the Communications Act. By insulating the bankruptcy court's decision from further review, the court of appeals' decision encourages the insincere and speculative bidding that the FCC tried to preclude through adoption of rules like the full-and-timely-payment condition. In both doctrinal and practical terms, therefore, the issue pre-

sented in this case is of sufficient importance to warrant this Court's plenary review.

ARGUMENT

The court of appeals' application in this case of the equitable mootness doctrine—whatever its provenance (*see* Pet. 21-23)—violated the principle, repeatedly recognized by this Court, that the Bankruptcy Code does not obstruct actions that further the government's regulatory interests, rather than its, or a third party's, pecuniary interests. Indeed, this case marks the first time that the equitable mootness doctrine has ever been used to limit the ability of a government agency to effectuate its delegated regulatory authority. As a result of the court of appeals' unprecedented application of equitable mootness, GWI has obtained a form of relief—the right to retain its licenses despite failing to pay the amounts that it bid—that the FCC, in the exercise of its regulatory authority, had refused to grant. Allowing such an escape hatch will seriously undermine the utility of auctions as a mechanism for allocating spectrum licenses.

A. Congress has vested the FCC with authority to grant telecommunications licenses if the "public convenience, interest, or necessity will be served thereby." 47 U.S.C. § 307(a); *see also, e.g.*, *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168 (1968). As this Court has recognized, "it is the Commission, not the courts, which must be satisfied that the public interest will be served" by the grant of a license. *FCC v. WOKO, Inc.*, 329 U.S. 223, 229 (1946). Congress has authorized the Commission to allocate spectrum through comparative hearings, lotteries, and auctions, but has "draw[n] no categorical distinctions among the three methods"—"[e]ach is presumed to be a regulatory tool for ensuring that licenses are distributed in the way that fulfils the goals of the [Communications Act]." *In re NextWave*, 200 F.3d at 53; *see also* 47 U.S.C. § 309(j)(6)(A), (C), (D).

In establishing rules for its auctions, the FCC began with the premise, which Congress shared, that competitive bidding would ensure that spectrum is allocated to the user that offers the greatest benefits to the public. *See Second Report and Order*, 9 FCC Rcd at 2361, ¶ 71 ("[A]ward[ing] licenses to those bidders with the highest willingness to pay tends to promote the development and rapid deployment of new services . . . and the efficient and intensive use of the spectrum.") (internal quotation marks omitted); H.R. Rep. at 249 (auctions will "ensure that spectrum is used more productively and efficiently than if handed out for free").

The payment rules the FCC established—requiring full and timely payment of the winning bid, automatically canceling licenses in the event of default, and imposing penalties on defaulting licensees—are essential to achieving those objectives. As the Commission explained, absent such rules, bidders could submit bids that are unrelated to, and in excess of, their expected return on the spectrum, fail to pay those bids, and thereby obtain spectrum that others value more highly than they do, thus undermining the utility of auctions as a method for allocating licenses. *See, e.g., Second Report and Order*, 9 FCC Rcd at 2373, ¶ 147, 2381-82, ¶ 192, 2390, ¶ 237; *see also In re NextWave*, 200 F.3d at 52 ("The FCC gave considerable thought to the problem of how to 'deter frivolous or insincere bidding.'") (quoting *Second Report and Order*, 9 FCC Rcd at 2378, ¶ 171). For this reason, the Commission rejected proposals by C-Block licensees "that would have dramatically changed the amount bid for licenses." *Restructuring Order*, 12 FCC Rcd at 16438, ¶ 5; *accord* Order on Reconsideration of the Second Report and Order, *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, 13 FCC Rcd 8345, 8356, ¶ 29 (1998).

Thus, the FCC's auction process "used the willingness and ability of [an applicant] to pay more than its competitors as the basis on which it decided to grant the Licenses." *In re NextWave*, 200 F.3d at 54. Licenses were therefore expressly conditioned on full and timely payment of the amount bid, with automatic cancellation as the consequence of any failure to comply with the payment schedule. *See* Pet. App. 175a. This condition, along with others, ensures the licensee's qualification as the best user of the spectrum.

In this case, the Commission sought to enforce that condition, thereby ensuring that the licenses were allocated in accordance with the public interest, by requiring GWI to pay the full amount that it bid or to forfeit its licenses. The bankruptcy court, however, deemed this dispute "not a regulatory issue, but a creditor issue." *Id.* at 150a. As the Second Circuit explained, this approach was "fundamentally mistaken." *In re NextWave*, 200 F.3d at 54. The auction rules have "primarily a regulatory purpose"—the allocation of licenses in the public interest, to "those most likely to further congressionally defined objectives"—and the fact that "market forces are the technique used to achieve that regulatory purpose does not turn the FCC into a mere creditor." *Id.* Indeed, even if a solvent third party had guaranteed payment of the penalties that GWI owed the FCC upon default, GWI's default would still have rendered it "not entitled to the Licenses," *id.*, thus demonstrating that the FCC's attempt to cancel these licenses was in furtherance of its regulatory authority, not merely its pecuniary interests.

Moreover, the bankruptcy court's conclusion that the FCC was acting solely as a creditor in canceling GWI's licenses for failure to comply with the full-and-timely-payment condition—let alone its conclusion that "Congress mandated that the FCC become, in effect, a lending institution," Pet. App. 158a—cannot be reconciled with section 309(j) of the Communications Act. Con-

gress expressly precluded the FCC from basing a decision to auction spectrum on "the expectation of Federal revenues." 47 U.S.C. § 309(j)(7)(A); *see id.* § 309(j)(7)(B) (Commission may not select auction rules based "solely or predominantly on the expectation of Federal revenues"); *see also* H.R. Rep. at 258 ("The Commission is not a collection agency of the U.S. Government, and should not . . . be influenced by budgetary considerations.").[4] In keeping with this congressional directive, the FCC consistently affirmed that the auction of C-Block PCS licenses was designed *not* simply to raise revenue, but instead primarily to allocate the licenses in accordance with the public interest. *See Second Report and Order*, 9 FCC Rcd at 2361, ¶¶ 72-73; *Restructuring Order*, 12 FCC Rcd at 16438-39, ¶¶ 3, 5; *see also PLMRS Narrowband Corp. v. FCC*, 182 F.3d 995, 1001-02 (D.C. Cir. 1999).

B. As this Court has repeatedly affirmed, the Bankruptcy Code does not interfere with government actions in furtherance of regulatory goals. As shown above, when the FCC attempted to cancel GWI's licenses, it stood in relation to GWI as a regulator seeking to allocate licenses in the public interest, not as a creditor seeking compensation. As such, the bankruptcy court had no warrant to "scrutinize the validity of [the FCC's] administrative . . . action." *MCorp*, 502 U.S. at 40; *cf. Raleigh v. Illinois Dep't of Revenue*, 530 U.S. 15, 17 (2000) ("[B]ankruptcy does not alter the burden imposed by the substantive law."); *United States v. Consumer Health Servs. of America, Inc.*, 108 F.3d 390, 394-96

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[4] As the Second Circuit recognized, if the FCC, *after* canceling GWI's licenses, were to seek to recover the penalties imposed on a defaulting licensee, it would then be acting as a creditor, and the bankruptcy court would have authority to resolve those claims. *See In re NextWave*, 200 F.3d at 55, 56, 59. Such an action "do[es] not touch upon the FCC's regulatory authority," which would be vindicated once the licenses have been canceled; rather, a post-cancellation liability for penalties is "like the obligations between ordinary debtors and creditors." *Id.* at 55.

(D.C. Cir. 1997). For that reason, as the Second Circuit held, no provision of the Bankruptcy Code authorized judicial interference with the automatic cancellation of GWI's licenses. *See In re FCC*, 217 F.3d at 138-39.

This general principle—that the Bankruptcy Code regulates relationships between creditors and not between a debtor and a government agency acting in its regulatory capacity—is evidenced in this Court's decisions construing the scope of the Bankruptcy Code's automatic stay provision. *See* 11 U.S.C. § 362(a). That provision, this Court explained, "does not apply to suits to enforce the regulatory statutes of the State." *Kovacs*, 469 U.S. at 283 n.11. Similarly, in *MCorp*, this Court rejected the petitioner's claim that bankruptcy courts must determine whether an agency's "exercise of . . . regulatory power is legitimate" before exempting a regulatory action from the automatic stay, because "it conflicts with the broad discretion Congress has expressly granted many administrative entities and . . . it is inconsistent with the limited authority Congress has vested in bankruptcy courts." *MCorp*, 502 U.S. at 40 (citing 11 U.S.C. § 362(b)(4)).[5]

This Court has likewise held that the Bankruptcy Code does not interfere with penal sanctions insofar as they promote "the benefit of society as a whole" rather than "the victim's desire for compensation." *Robinson*, 479 U.S. at 47, 50-53. In analyzing the purpose of the criminal penalty at issue in *Robinson*, this Court distinguished a sanction that "operate[s] 'for the benefit of'

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[5] In construing section 554(a) of the Bankruptcy Code, which permits a bankruptcy trustee to abandon property of an estate, this Court held that "a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards." *Midlantic Nat'l Bank*, 474 U.S. at 507; *see also id.* at 505-06 (concluding, based in part on the federal policy embodied in RCRA and CERCLA, that "Congress did not intend for the Bankruptcy Code to pre-empt all state laws that otherwise constrain the exercise of a trustee's powers").

the State'" from one "assessed 'for . . . compensation' of the victim," with only the latter being a debt dischargeable in bankruptcy. *Id.* at 52-53 (omission in original); *see also Perez*, 402 U.S. at 653-54 & n.14 (purpose of state statute at issue was not "deterrence of irresponsible driving" but rather "provision of relief to creditors"). Therefore, if "a person drives recklessly and collides with a city garbage truck"—and not only receives a traffic citation but also is sued by the city for damages—that "person can discharge the judgment for damaging the truck, but he cannot discharge his reckless driving fine." *United States Dep't of Housing & Urban Dev. v. Cost Control Marketing & Sales Mgmt. of Virginia, Inc.*, 64 F.3d 920, 928 (4th Cir. 1995). While the traffic ticket advances the government's regulatory interests, the damages suit primarily furthers its pecuniary interests in receiving compensation for its injuries.

As the Second Circuit correctly recognized, this same distinction applies to prevent a bankruptcy court from impairing the licensing authority that Congress delegated to the FCC. In issuing and revoking a license, even one awarded at auction, the Commission acts pursuant to its regulatory authority, and bankruptcy courts are not permitted "to decide whether [the FCC's action] is provident and in the public interest"; rather, they must "refrain from interfering with the licensing decisions of the FCC." *In re FCC*, 217 F.3d at 138-39; *see id.* at 135 ("[t]he FCC need not defend its regulatory calculus *in the bankruptcy court*"); *In re NextWave*, 200 F.3d at 55 ("sole responsibility for the allocation of licenses lies with the FCC"); *id.* at 59 ("the regulatory function is not ended by the bankruptcy of a licensee"). Thus, the Second Circuit held, following this Court's decision in *MCorp*, that neither the automatic stay nor other provisions of the Bankruptcy Code prevented cancellation of a debtor's C-Block licenses. *See In re FCC*, 217 F.3d at 138-39 (citing *MCorp*, 502 U.S. at 40).

Congress has made clear that the FCC enforces its license-retention rules—whether the full-and-timely-payment condition, which requires payments to the government, or the "build out" requirement, which does not, *see* 47 C.F.R. § 24.203(a)—pursuant to its regulatory authority to allocate licenses in the public interest. Issuance of licenses at auction, Congress expressly provided, shall not "diminish the authority of the Commission under the other provisions of [the Communications Act] to regulate *or reclaim* spectrum licenses" or "be construed to convey any rights . . . that differ from the rights that apply to other licenses . . . not issued [at auction]." 47 U.S.C. § 309(j)(6)(C)-(D) (emphasis added). Accordingly, both the Installment Payment Plan Note and the Security Agreement that GWI signed explicitly stated that the FCC's regulatory authority to cancel GWI's licenses is independent of "the enforceability of this Note or the Security Agreement." B.R. Tab 28, Gov't Exh. 260, at 3; *see also id.*, Gov't Exh. 261, at 2 (FCC's rights as a creditor are "not in derogation of any of the Commission's regulatory authority over the License"). Indeed, it would be absurd to suggest that the FCC's power to cancel GWI's licenses was *diminished* when the Commission took the extra step of requiring GWI to sign these documents: the regulatory power sufficed in their absence; their addition cannot lessen it.

This Court's precedent, as applied by the Second Circuit in an analogous context, confirms that the bankruptcy court erred when it overrode the FCC's regulatory decision that GWI could not retain its licenses without satisfying the full-and-timely-payment condition, and thereby took on the policymaking role that Congress has committed to the FCC. The bankruptcy court's conclusion that cancellation of the licenses would "frustrat[e] the Congressional mandate of Section 309 of the Communications Act," while its own application of the Bankruptcy Code had "the salutary effect . . . of advancing rather than hindering the mandate of Section 309," Pet. App. 162a; *accord id.* at 150a,

155a, 161a-162a; *see also id.* at 69a, 86a, 94a-96a, involved precisely the kind of usurpation of the FCC's licensing authority that the Second Circuit rejected as "fundamentally mistaken," *In re NextWave*, 200 F.3d at 54; *see also In re FCC*, 217 F.3d at 136-37 (bankruptcy court, by holding that its decision, rather than the FCC's, better furthered the objectives of section 309(j), had impermissibly "question[ed] the FCC's regulatory judgments").

In holding that events had rendered the FCC's challenge to the bankruptcy court's decision equitably moot, the court of appeals made the same error. Although recognizing that the bankruptcy court had "tak[en] onto itself a quasi-regulatory function held by the FCC," Pet. App. 31a, the court of appeals found no need to consider whether equitable mootness is appropriately used to preclude judicial review of a bankruptcy court decision that interfered with a government agency's exercise of its regulatory authority.[6] Yet equitable mootness balances the interests of new investors in the bankrupt debtor against the interest of *creditors* in obtaining review of the bankruptcy court's order.[7] Thus, the factors that the court of appeals considered in determining that

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[6] As a result of the court of appeals' decision, GWI has received through bankruptcy a remedy that it had been denied in the regulatory forum; it has thus received more favorable treatment than other non-bankrupt C-Block licensees, whose licenses were cancelled after they defaulted on their payment obligations. *See, e.g.*, Memorandum Opinion and Order, *Licenses of 21st Century Telesis, Inc.*, FCC 00-434, 2000 WL 1862889, ¶ 27 (rel. Dec. 21, 2000). GWI, therefore, has received a "'head start,'" rather than the "'fresh start'" that Congress intended to afford debtors in bankruptcy. *Duffey v. Dollison*, 734 F.2d 265, 273 (6th Cir. 1984) (quoting *In re Cerny*, 17 B.R. 221, 224 (Bankr. N.D. Ohio 1982)); *cf. Raleigh*, 530 U.S. at 25 (recognizing importance of "equal treatment of comparable creditors in and out of bankruptcy").

[7] *See* Pet. App. 22a n.24; *see also In re Manges*, 29 F.3d 1034, 1039 (5th Cir. 1994); *In re Club Assocs.*, 956 F.2d 1065, 1069 (11th Cir. 1992); *In re Information Dialogues, Inc.*, 662 F.2d 475, 476-77 (8th Cir. 1981) (per curiam).

the FCC's challenge was equitably moot took no account of the FCC's *regulatory* interest in enforcing the full-and-timely-payment condition on GWI's licenses.

Finally, even when only creditors' interests are at issue, the doctrine of equitable mootness "is 'limited in scope and [should be] cautiously applied.'" *In re PWS Holding Corp.*, 228 F.3d 224, 236 (3d Cir. 2000) (Becker, C.J.) (quoting *In re Continental Airlines*, 91 F.3d 553, 559 (3d Cir. 1996) (en banc)) (alteration in original); *see also In re Envirodyne Indus., Inc.*, 29 F.3d 301, 304 (7th Cir. 1994) (Posner, C.J.) (equitable mootness can apply only when modification of reorganization plan "would upset *legitimate* expectations" of creditors") (emphasis added). Here, where a government agency's regulatory interests were impaired, and no entity had a legitimate expectation that GWI could retain its licenses in violation of FCC regulations, there was no basis for the court of appeals to abstain, on prudential grounds, from reaching the merits of the FCC's appeal. The court of appeals' decision to apply the equitable mootness doctrine—and thereby to frustrate the FCC's license allocation decisions and encourage the type of speculative and insincere bidding that the FCC's payment rules were designed to prevent—conflicts with decisions of this Court and of the Second Circuit and warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

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